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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CEMEX, S.A.,
Petitioner,

v.

UNITED STATES OF AMERICA,
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
and APASCO, S.A. de C.V.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITIONER'S REPLY BRIEF

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RULE 29.1 STATEMENT

A complete statement for CEMEX, S.A. in accordance with Rule 29.1 was included in CEMEX's Petition for Certiorari in this case. The information contained in that statement has not changed.

TABLE OF CONTENTS

	Page
RULE 29.1 STATEMENT	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
I. A SIGNIFICANT NUMBER OF DEPARTMENT OF COMMERCE INVESTIGATIONS HAVE ALREADY BEEN AFFECTED BY THE *AD HOC COMMITTEE* DECISION	3
II. THE FACT THAT THE URUGUAY ROUND LEGISLATION *MAY* ADDRESS THE DEDUCTION OF PRE-SALE TRANSPORTATION EXPENSES *PROSPECTIVELY* IS NOT GROUNDS FOR THIS COURT TO DENY THE PETITION FOR CERTIORARI	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

Ad Hoc Committee v. United States, 13 F.3d 398 (Fed. Cir. 1994) 1
Bennett v. New Jersey, 470 U.S. 632, 105 S.Ct. 1555 (1985) 9
Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468 (1988) 9
Federal-Mogul Corporation v. United States, 18 CIT —, Slip Op. 94-40 (March 7, 1994) 7
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 110 S.Ct. 1570 (1990) 9
Shwab v. Doyle, 258 U.S. 529, 42 S.Ct. 391 (1922) .. 9
The Timken Company v. United States, 18 CIT —, Slip Op. 94-41 (March 7, 1994) 7
The Timken Company v. United States, 18 CIT —, Slip Op. 94-87 (May 27, 1994) 7
The Timken Company v. United States, 18 CIT —, Slip Op. 94-95 (June 9, 1994) 7
The Timken Company v. United States, 18 CIT —, Slip Op. 94-107 (July 1, 1994) 7
The Torrington Company v. United States, 18 CIT —, 850 F. Supp. 7 (1994) 7
The Torrington Company v. United States, 18 CIT, —, 850 F. Supp. 12 (1994) 7

Statutes and Regulations

19 U.S.C. § 1677b(a) (4) (B) 3
19 CFR § 353.56(b) (2) 3

Administrative Determinations

Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, 58 Fed. Reg. 39,729 (1993) 4
Calcium Aluminate Cement, Cement Clinker and Flux From France, 59 Fed. Reg. 14,136 (1994) .. 5
Color Negative Photographic Paper and Chemical Components Thereof From Japan, 59 Fed. Reg. 16,177 (1994) 5

TABLE OF AUTHORITIES—Continued

Page

Color Television Receivers From the Republic of Korea, 59 Fed. Reg. 21,958 (1994) 4
Gray Portland Cement and Clinker From Japan, 59 Fed. Reg. 6,614 (1994) 4
Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan, 58 Fed. Reg. 30,018 (1993) 4
Oil Country Tubular Goods From Canada, 59 Fed. Reg. 18,798 (1994) 4
Phthalic Anhydride From Venezuela, 59 Fed. Reg. 27,532 (1994) 5
Stainless Steel Bar From India, 59 Fed. Reg. 39,733 (1994) 5
Stainless Steel Bar From Italy, 59 Fed. Reg. 39,736 (1994) 5
Stainless Steel Bar From Spain, 59 Fed. Reg. 39,740 (1994) 5
Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan, 57 Fed. Reg. 9,105 (1992) 4
Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan, 57 Fed. Reg. 4,960 (1992) 4

Miscellaneous

House Offer: Outstanding Differences Between the House Ways and Means and Senate Finance Committees on Implementing Legislation for the Uruguay Round Trade Agreements (August 22, 1994) 8
Senate Committee on Finance Counteroffer to House Committee on Ways and Means Offer of August 22, 1994 on Outstanding Differences on Legislation Implementing the Uruguay Round Trade Agreements (September 13, 1994) 9

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner CEMEX, S.A. is filing this reply brief to address two new arguments raised in the Response Briefs filed by the Respondents United States and the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement in opposition to CEMEX's Petition for Certiorari in this case. In accordance with the rules of this Court, this brief addresses only issues which were not already discussed in CEMEX's Petition for Certiorari.

In its brief in opposition to CEMEX's Petition for Certiorari, the United States fully agrees with CEMEX's substantive position, acknowledging that in its decision in *Ad Hoc Committee v. United States,* 13 F.3d 398 (Fed.

Cir. 1994), the Court of Appeals for the Federal Circuit "erred in inferring that Congress intended to deny inland freight deductions from FMV [(foreign market value)] because it addressed the topic of transportation expenses explicitly only in defining USP." *Brief for the United States in Opposition* at 10. In spite of agreeing with CEMEX that the Federal Circuit's decision was erroneous, however, the United States argues that the Court should nonetheless deny CEMEX's Petition for Certiorari because relatively few cases are affected by the decision. The United States further argues that CEMEX's Petition should be rejected because it is likely that Congress will soon pass legislation that will address the substantive complaint in this case. *Id.* A similar argument is also raised briefly by Respondent Ad Hoc Committee. *Brief in Opposition For the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement* at 13.

Both of these arguments ignore the injury to CEMEX that results from the decision of the Federal Circuit, as well as the injury to various other producers and importers who have been and will yet be adversely affected by the decision below. The Court should be aware that a significant number of Department of Commerce proceedings have *already* been affected by the *Ad Hoc Committee* decision, and even more are likely to be affected in the future if the case remains law. Moreover, even if relatively few cases were affected by the decision (which, again, is not the case), the individual respondents in those cases would nonetheless suffer real monetary loss if dumping margins are inflated as a result of the *Ad Hoc Committee* decision.

Furthermore, the legislative remedy referred to by the United States may or may not be enacted into law, and even if it is, it is currently drafted to apply only *prospectively*. It is uncertain whether the GATT implementing legislation will be passed by Congress with the draft provision addressing this issue intact, given that the language is included only in the House, and not in the Senate, ver-

sion of the legislation, and given that influential voices in Congress are calling for delay in the introduction of the final bill. Even more importantly, the new language would, as currently drafted, apply only to investigations and administrative reviews initiated *after* the date the legislation becomes effective. For CEMEX, the first four administrative reviews of the antidumping duty order, covering four years of trade valued at approximately $125 million, have already been initiated, and these, as well as various other proceedings already before the Department of Commerce and the U.S. Court of International Trade, would remain subject to the holding in *Ad Hoc Committee*, a case the United States acknowledges was decided incorrectly.

I. A SIGNIFICANT NUMBER OF DEPARTMENT OF COMMERCE INVESTIGATIONS HAVE ALREADY BEEN AFFECTED BY THE *AD HOC COMMITTEE* DECISION

In its brief in opposition, the United States first claims that "[t]he decision below does not have a significant impact on Commerce's ability to make fair comparisons between USP and FMV *in most cases.*" *Brief of the United States in Opposition* at 15 (emphasis added). The government's statement obscures the fact that the issue of deducting pre-sale transportation expenses from foreign market value does arise in a significant number of the antidumping cases brought before the Department of Commerce. It also ignores the fact that in nearly every case, Commerce makes a deduction from foreign market value for *post*-sale transportation expenses under either the circumstances of sale (19 U.S.C. § 1677b(a)(4)(B)) or the ESP offset (19 CFR § 353.56(b)(2)) provisions. Such deductions have also already been questioned under the holding of *Ad Hoc Committee*.

The Court should be aware that in addition to the Mexican cement investigation at issue in this litigation, and the four administrative reviews thus far resulting therefrom, the deduction of pre-sale transportation expenses

was raised in each of the following proceedings before the Commerce Department in just the past few years: *Color Television Receivers From the Republic of Korea,* 59 Fed. Reg. 21,958 (1994); *Oil Country Tubular Goods From Canada,* 59 Fed. Reg. 18,798 (1994); *Gray Portland Cement and Clinker From Japan,* 59 Fed. Reg. 6,614 (1994); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom,* 58 Fed. Reg. 39,729 (1993); *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 57 Fed. Reg. 9,105 (1992); and *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, From Japan,* 57 Fed. Reg. 4,960 (1992). *See also Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, from Japan,* 58 Fed. Reg. 30,018 (1993) (deduction of pre-sale warehousing expenses from foreign market value permitted pursuant to rationale used by Commerce Department in Mexican cement case). In the determinations above which predated the Federal Circuit's decision in *Ad Hoc Committee,* the Department of Commerce agreed that the pre-sale transportation (or warehousing) expenses in the home market should be fully deducted from foreign market value in order to ensure a fair, ex-factory to ex-factory comparison between foreign market value and U.S. price. In the determinations published after the decision, the Commerce Department ceased to make a full deduction for pre-sale transportation expenses on the basis of its inherent authority to make equitable price comparisons, citing the Federal Circuit's *Ad Hoc Committee* decision. Notably, the orders in each of these cases will continue to be subject to administrative reviews, where the same issue is likely to arise time and time again, giving the *Ad Hoc Committee* decision continuing influence over at least eight ongoing proceedings. Moreover, it is important to note that the cases cited above are those in which the deduction of pre-sale transportation expenses

was controversial. The issue undoubtedly arises in many other cases as well—most likely, in any case where merchandise is warehoused at a distance from the factory prior to sale in the home market.

The Department of Commerce has continued to deduct *post*-sale transportation expenses from foreign market value under the circumstance of sale provision and, in exporter's sales price cases, under the ESP offset provision, claiming that this approach is in keeping with the holding of *Ad Hoc Committee*. For example, in *Stainless Steel Bar From India*, 59 Fed. Reg. 39,733 (1994), Commerce noted that "[i]n light of the Court of Appeals for the Federal Circuit's (CAFC) decision in *Ad Hoc Committee* . . ., the Department no longer can deduct home market movement charges from FMV pursuant to its inherent power to fill in gaps in the antidumping statute. Instead, we will adjust for those expenses under the circumstance-of-sale provision of 19 CFR 353.56(a) and the exporter's sales price offset provision of 19 CFR 353.56(b)(2), as appropriate." 59 Fed. Reg. at 39,735. Commerce went on to deduct post-sale home market transportation expenses under the circumstance of sale provision.[1] The Commerce Department made similar determinations in *Stainless Steel Bar From Italy*, 59 Fed Reg. 39,736 (1994); *Stainless Steel Bar From Spain*, 59 Fed. Reg. 39,740 (1994); *Phthalic Anhydride From Venezuela*, 59 Fed. Reg. 27,532 (1994); *Color Negative Photographic Paper and Chemical Components Thereof From Japan*, 59 Fed. Reg. 16,177 (1994); and *Calcium Aluminate Cement, Cement Clinker*

[1] As explained in greater detail in the *Ad Hoc Committee* opinion, under the circumstance of sale provision, only costs directly related to the sales at issue can be deducted from foreign market value. Typically, the Department of Commerce holds post-sale transportation costs to be directly related to sales, while pre-sale costs are generally found to be indirect. This generally prevents pre-sale transportation costs from being deducted from foreign market value under the circumstance of sale provision. *See Petition For Certiorari* at 18a-19a, n.2.

and Flux From France, 59 Fed. Reg. 14,136 (1994). In each of these cases, Commerce cited *Ad Hoc Committee* as affecting its methodology for calculating foreign market value.

While the Commerce Department may believe that it can avoid the impact of the *Ad Hoc Committee* decision at least in cases where the home market transportation expenses were incurred post-sale, by making a deduction under the circumstance of sale or ESP provisions, it is not at all clear whether this interpretation will prevail in future cases interpreting the holding of *Ad Hoc Committee.* At a minimum, the case prohibits Commerce from making any deduction of home market transportation expenses from foreign market value on the basis of its "inherent authority" to make fair comparisons between foreign market value and U.S. price. The full reach of the decision, however, is not yet known. Respondent Ad Hoc Committee has already argued that the Federal Circuit's opinion should be read not only as prohibiting the deduction of pre-sale transportation expenses from foreign market value on the basis of "inherent authority" to make fair comparisons, but as *also* prohibiting the deduction of such expenses under the circumstance of sale provision. *See Plaintiff's Response to CEMEX's Comments on the Commerce Department's Final Results of Redetermination Pursuant to Court Order,* Court of International Trade No. 90-10-0508 (July 22, 1994). If Ad Hoc Committee's interpretation of the Federal Circuit's decision prevails, it would preclude the deduction of all home market transportation expenses from foreign market value under *any* provision.[2] The decision would thus render each of the

[2] Although *Ad Hoc Committee* deals exclusively with pre-sale home market transportation costs, the rationale used by the Federal Circuit might be applied equally to post-sale transportation costs, since these are not specifically enumerated as a deduction on the foreign market value side either, while they are enumerated on the U.S. price side. Hence, if pre-sale transportation expenses

cases involving post-sale transportation expenses listed in the foregoing paragraph vulnerable to attack under *Ad Hoc Committee,* since Commerce's response to *Ad Hoc Committee* in those cases was simply to resort to the circumstance of sale provision.

Therefore, the decision in *Ad Hoc Committee* will henceforth severely limit Commerce from making an adjustment to foreign market value for pre-sale inland transportation expenses in future administrative reviews in any of the cases discussed above (as it already has in the most recent determinations), and may prevent such adjustments for post-sale transportation expenses, as well. The decision will thus prevent Commerce from making equitable comparisons of U.S. price and foreign market value in those cases. In proceedings subject to ongoing judicial review, the Department will be compelled to go back and adjust existing determinations in accordance with the Court's opinion. In fact, the deduction of pre-sale transportation expenses in the three bearings cases alone has already generated *seven* decisions by the Court of International Trade remanding proceedings to the agency in the wake of *Ad Hoc Committee. See The Torrington Company v. United States,* 18 CIT —, 850 F. Supp. 7 (1994); *The Torrington Company v. United States,* 18 CIT —, 850 F. Supp. 12 (1994); *Federal-Mogul Corporation v. United States,* 18 CIT —, Slip Op. 94-40 (March 7, 1994); *The Timken Company v. United States,* 18 CIT —, Slip Op. 94-41 (March 7, 1994); *The Timken Company v. United States,* 18 CIT, Slip Op. 94-87 (May 27, 1994); *The Timken Company v. United States,* 18 CIT —, Slip Op. 94-95 (June 9, 1994; and *The Timken Company v. United States,* 18 CIT —, Slip Op. 94-107 (July 1, 1994).

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cannot be deducted from foreign market value under the circumstance of sale provision under the rationale of *Ad Hoc Committee,* neither can post-sale transportation expenses.

In the past three years alone, the Commerce Department has therefore conducted numerous proceedings which either have already been affected or which may be affected by the *Ad Hoc Committee* decision, and the decision is likely to have an impact on many more to come. Contrary to the Government's position, therefore, the decision does have a very broad sweep, and this Court should not reject CEMEX's petition on the basis of any perceived lack of effect.

II. THE FACT THAT THE URUGUAY ROUND LEGISLATION *MAY* ADDRESS THE DEDUCTION OF PRE-SALE TRANSPORTATION EXPENSES *PROSPECTIVELY* IS NOT GROUNDS FOR THIS COURT TO DENY THE PETITION FOR CERTIORARI

The United States further argues that this Court should reject CEMEX's Petition for Certiorari because "it is likely that Congress will soon clarify Commerce's authority to [adjust FMV for home-market transportation expenses] in all appropriate cases under legislation that will implement the current General Agreement on Tariffs and Trade (GATT)." United States Brief at 10. Ad Hoc Committee in turn argues that pending legislation on this issue makes consideration by this court "premature". Ad Hoc Committee Brief at 13.

While it is true that the House of Representatives' current draft of the implementing legislation for the Uruguay Round GATT Agreement contains a provision that would specifically require the Department of Commerce to deduct home market transportation expenses from foreign market value (described as "normal value" in the draft legislation), the Senate version of the legislation does not contain this language. *See* House Offer: Outstanding Differences Between the House Ways and Means and Senate Finance Committees on Implementing Legislation for the Uruguay Round Trade Agreements (August 22, 1994) at 9. Moreover, in the Senate Finance Committee counteroffer to the House draft legislation, which was just released on

September 13, 1994, the Finance Committee refused to accept the House provision on home market transportation expenses. *See* Senate Committee on Finance Counteroffer to House Committee on Ways and Means Offer of August 22, 1994 on Outstanding Differences on Legislation Implementing the Uruguay Round Trade Agreements (September 13, 1994) at 11. (Reprinted at Appendix 1a). This makes the provision vulnerable to being stripped out of the legislation completely.

In addition, it is by no means certain when or whether the GATT implementing legislation will be enacted. Members of Congress have been unable to agree on crucial elements of the legislation, and several key legislators, including the Senate Minority Leader, have pressed their colleagues to delay consideration of the bill. Thus, passage of the provision correcting the *Ad Hoc Committee* decision is not by any means assured.

More importantly, however, the passage of the legislation as currently drafted by the House of Representatives would not, in any event, provide a remedy for CEMEX as ot merchandise entered into the United States prior to enactment of any remedial legislation. Supreme Court precedent holds that new legislation does not apply retroactively to cases pending at the time of passage unless the statute or the legislative history clearly manifests an intent that it do so. *See, e.g., Kaiser Aluminum & Chemical Corp v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570 (1990); *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 109 S.Ct. 468 (1988); *Bennett v. New Jersey,* 470 U.S. 632, 105 S.Ct. 1555 (1985); *Shwab v. Doyle,* 258 U.S. 529, 42 S.Ct. 391 (1992). Since there is currently no language in the proposed legislation making the provision concerning the deduction of home market transportation expenses retroactive, any potential amendment to the antidumping duty statute would apply only prospectively, and would have no effect on merchandise entered during the first four administrative review periods, valued at over $125 million.

Given that the GATT implementing legislation, in its current form, would not apply retroactively, it would provide no relief to CEMEX in any of the administrative reviews initiated prior to the passage of the legislation (four reviews as of the filing of this brief). Nor would the legislation affect the seven judicial proceedings that have grown out of the bearings cases, which were described earlier, or any judicial proceedings that may arise from the other administrative determinations already affected by the *Ad Hoc Committee* decision, which were described in the foregoing sections. The possibility that Congress might at some time pass legislation correcting prospectively the erroneous decision of the Federal Circuit in *Ad Hoc Committee* should not, therefore, be used as a rationale for denying CEMEX's Petition for Certiorari.

CONCLUSION

For the foregoing reasons, and for the reasons set out in CEMEX's Petition For A Writ Of Certiorari, CEMEX respectfully requests that its Petition be granted.

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